

Product Liability For Online Marketplaces And Car-Sharing

By **Steven Kramer** (September 27, 2018, 1:44 PM EDT)

"All I know since yesterday is everything has changed." [1] We have moved from purchasing products at retail stores, to ordering from online marketplaces, "sharing" motor vehicles and having groceries delivered by autonomous vehicles. [2] How does traditional product liability law fit into this new world?



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Online Marketplaces

Global revenue from online marketplaces (such as Jet.com Inc. and Amazon Inc.) is predicted to more than double from \$18.7 billion in 2017 to \$40.1 billion in 2022. [3] Online marketplaces are "[a]bout more than selling products. These portals serve consumer demand for resale and rentals, as well as for finding and booking services." [4]

Imposition of strict products liability is easy to rationalize as applied to manufacturers of products. [5] As one court put it, "the purpose of such liability is not to regulate conduct with a view to eliminating accidents, but rather to remove the economic consequences of accidents from the victim who is unprepared to bear them and place the risk on the enterprise in the course of whose business they arise." [6] There is divergence across the nation, however, for imposing strict liability at the distribution and retail sales level. Some jurisdictions impose strict liability [7] while others provide immunity. [8]

The question in today's age is whether online marketplaces are retailers or distributors. Do Jet and Amazon sell you a product? Or are they a service which facilitates a sale?

In *Eberhart v. Amazon.com Inc.*, the court answered an open question in New York: "Is an 'online marketplace' such as Amazon subject to strict products liability?" [9] The court held no, reasoning:

First, regardless of what attributes are necessary to place an entity within the chain of distribution, the failure to take title to a product places that entity on the outside. [10]

Second, as it is not a distributor, Amazon is better characterized as a provider of services. Here, Amazon provided three services: (1) maintaining an online marketplace, (2) warehousing and shipping goods, and (3) processing payments. None of these service activities subjects Amazon to strict liability. [11]

Finally, it appears that every court to consider the question of Amazon's

liability has concluded that Amazon is not strictly liable for defective products sold on its marketplace.[12]

Product ownership is the key. The Eberhart court explained “the requirement that a distributor must, at some point, own the defective product is reinforced by the Restatement (Third) of Torts: Products Liability Furthermore, the Restatement excludes ‘product distribution facilitators’ — i.e., ‘[p]ersons assisting or providing services to product distributors,’ such as advertisers, sales personnel, and auctioneers — from the definition of distributors. Id. § 20 cmt. g.”[13]

Eberhart is consistent with decisions involving brokers. In *Oscar Mayer Corp. v. Mincing Trading Corp.*,[14] the plaintiff ordered black pepper from the defendant and the defendant used a broker to fill the order. The broker located an importer of spices, and the importer sold the pepper directly to the defendant. It was undisputed “[t]hat the broker never had title to, possession or control of the peppercorns.”[15] The court granted the broker’s summary judgment motion, reasoning:

Sayia acted as a broker between an importer of whole black peppercorns and a supplier of re-cleaned and treated peppercorns for use as a spice in foods. Sayia never had title to, possession of, or control over the lot of peppercorns.

This Court is not aware of a precise definition of ‘chain of distribution’ for the purpose of attributing responsibility under strict liability in tort. The case law strongly suggests, however, that the category is meant to include manufacturers, distributors, suppliers or retailers and other parties that receive, sell, or resell the product. A broker who negotiates a contract of sale between the merchants who will be parties to the actual sale transaction does not fall within this category. Whereas an enterprise engaged in the chain of distribution can recapture the expense of an occasional defective product by an increase in the cost of the product, and a party that is in a contractual relationship with the manufacturer or supplier is in a position to exert pressure to ensure the safety of the product, a broker can do neither.

Sayia was not in a position to eliminate defects from the peppercorns. In these circumstances it would be unfair to impose strict liability on Sayia for damages incurred as a result of the defective peppercorns.[16]

It seems settled that online marketplaces which do not take ownership of products, but facilitate the sale of products designed, manufactured or sold by other entities, will not face strict product liability. Further, if the online marketplace does not make any representations about the product, it should not face warranty or representational liability. [17]

Transportation as a Service Car-Sharing Entities

A huge evolution has taken place in transportation. Consumers and manufacturers are embracing both an ownership and sharing model. The sharing model has evolved from going to the airport to pick up a rental to people-to-people car-sharing. Vehicle manufacturers have entered the car-sharing market and created on-demand sharing, with options such as picking up vehicles at designated locations or having the vehicle delivered to you. Services have sprung up such as Cadillac’s Book,[18] General Motors’ Maven,[19] Ford Motor Co.’s Chariot (transit shuttles)[20] and Toyota Motor Corp.’s Hui.[21]

Can the online marketplace legal rationale be applied to companies involved in transportation as a service, or TaaS? It seems easy to conclude that ride-hailing services such as Uber Inc. and Lyft Inc. would not face product liability for defective vehicles, but what about car-sharing services?

TaaS car-sharing members include non-manufacturers (Zipcar Inc. and rental companies), vehicle manufacturers and consumers (peer-to-peer). At its core, TaaS car-sharing involves the leasing of vehicles, albeit by new technologies and new time periods (by the minute, mile). One could therefore argue for application of current state lessor product liability law.[22] But given some TaaS car-sharing entities take title to a vehicle (such as vehicle manufacturers and rental car companies) while some third-party services do not, is lessor liability appropriate? Online marketplace jurisprudence should be applied, and the online services which do not have title should not face strict, warranty or representational liability.

Like any new business model/technology, online marketplaces present novel situations, and state law will have to tackle them. For now, some interesting open questions are:

- Would strict liability be applied to a separate, stand-alone online car-sharing marketplace if the service was created or purchased by a vehicle manufacturer?
- Is a person engaged in peer-to-peer car-sharing a “casual” or “regular” lessor? Some states hold that a “casual seller” does not face product liability.[23] How many peer-to-peer lease transactions (in numbers or dollar value) would it take to transform someone into a “regular” lessor?

Conclusion

Online marketplaces are here to stay. The convenience of ordering consumer products, groceries and vehicles through a service is driving new business models. These new models raise new product liability questions and it will take time to see the answers to them.

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[1] “Everything Has Changed” by Taylor Swift (featuring Ed Sheeran).

[2] <https://www.theverge.com/2018/7/25/17611760/waymo-walmart-self-driving-vehicles-groceries-discounts> (“In a blog post, Waymo said test riders primarily use the self-driving cars to run smaller errands like shopping at retail locations or to pick up groceries. The company is launching a test pilot in Arizona with Walmart later this week that will provide riders with discounts on groceries that are ordered through the massive supermarket chain’s website. While those orders are being prepared by Walmart employees, Waymo will transport customers to and from their homes to pick up their groceries”); <https://www.supermarketnews.com/online-retail/kroger-pilot-unmanned-grocery-delivery-vehicles> (“Kroger said Thursday that it plans to pilot unmanned road vehicles for grocery delivery under a partnership with Nuro, a Mountain View, Calif.-based robotics and artificial intelligence specialist. Slated to begin this fall, the test will enable customers to place grocery orders through Kroger’s ClickList system and Nuro’s app and have their items delivered the same day by a fleet of autonomous vehicles. Kroger said it

will announce the pilot market soon”).

[3] <https://www.retaildive.com/news/online-marketplace-revenues-to-double-by-2022/523738>.

[4] *Id.*

[5] See e.g. Henderson, *Extending the Boundaries of Strict Product Liability: Implications of the Theory of Second Best*, *University of Pennsylvania Law Review*, Vol. 128:1036 (1979).

[6] *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 440 (1963).

[7] See e.g. New York (*Sukljian v. Charles Ross & Son Co.*, 69 N.Y.2d 89, 95 (1986) (extending strict liability to “certain sellers, such as retailers and distributors,” for “products ... sold in the normal course of business”).

[8] See e.g. Alabama (Section 6-5-521, “No product liability action may be asserted or may be provided a claim for relief against any distributor, wholesaler, dealer, retailer, or seller of a product, or against an individual or business entity using a product in the production or delivery of its products or services (collectively referred to as the distributor) unless any of the following apply:”).

[9] *Eberhart v. Amazon.com Inc.*, 16-CV-8546 (JPO), 2018 WL 4080348 (S.D.N.Y. Aug. 27, 2018), at *3.

[10] *Id.* at *4.

[11] *Id.* at *5.

[12] *Id.* (“See *Allstate N.J. Ins. Co. v. Amazon.com Inc.*, No. 17 Civ. 2738, 2018 WL 3546197, at *5–12 (D.N.J. July 24, 2018) (applying New Jersey law); *Fox v. Amazon.com Inc.*, No. 16 Civ. 3013, 2018 WL 2431628, at *8 (M.D. Tenn. May 30, 2018) (applying Tennessee law); *Erie Ins. Co. v. Amazon.com Inc.*, No. 16 Civ. 2679, 2018 WL 3046243, at *1–3 (D. Md. Jan. 22, 2018) (applying Maryland law); *Oberdorf v. Amazon.com Inc.*, 295 F.Supp.3d 496, 499–501 (M.D. Pa. 2017) (applying Pennsylvania law); *Stiner v. Amazon.com Inc.*, No. 15 Civ. 185837, 2017 WL 9751163, at *5–7 (Ohio Com. Pl. 2017) (applying Ohio law); see also *Milo & Gabby LLC v. Amazon.com Inc.*, 693 F. App’x 879, 885 (Fed. Cir. 2017) (holding that Amazon is not a ‘seller’ under the Copyright Act, 17 U.S.C. § 106); *McDonald v. LG Elecs. USA Inc.*, 219 F.Supp.3d 533, 541–42 (D. Md. 2016) (dismissing a Maryland-law negligence claim against Amazon); *Inman v. Technicolor USA Inc.*, No. 11 Civ. 666, 2011 WL 5829024, at *5–6 (W.D. Pa. Nov. 18, 2011) (holding that eBay is not strictly liable as a ‘seller’”).

[13] *Id.* at *4.

[14] *Oscar Mayer Corp. v. Mincing Trading Corp.*, 744 F.Supp. 79 (D.N.J. 1990).

[15] *Id.* at 80.

[16] *Id.* at 84.

[17] *Id.* at *6 (“As to Eberhart’s claims for breach of express warranty and misrepresentation, the Court accepts Amazon’s (unrebutted) argument that because Amazon did not make any statement about the coffeemaker Therefore, Amazon is entitled to summary judgment on Eberhart’s warranty and misrepresentation claims”).

[18] <https://www.bookbycadillac.com> ("This on-demand service is personalized for every approved member. Simply download the BOOK by Cadillac app, select the vehicle you wish to drive and have it delivered directly to you").

[19] <https://www.mavendrive.com/#!/faq> ("Maven is a groundbreaking mobility program redefining transportation in rapidly growing urban areas. It starts with car-sharing and will serve as a platform for continuous innovation upgrades with the service and technology supporting it. Recently launched by General Motors in Ann Arbor in January 2016, it provides a station-based, self-service portfolio of small-to-large automobiles distributed all over the city. Maven Vehicles can be accessed with a phone application. Members can finish the trip in the authorized parking space. Attractive rates include costs for fuel, insurance, parking, maintenance and unique technology features").

[20] <https://www.chariot.com/about> ("At Chariot, we're focused on creating a transit solution that relieves congestion while offering a comfortable, personalized commuting experience. The core of our mission is universal access to better transportation. When the world runs on smarter routes, lower costs, and better ride experiences, we'll collectively take cars off the road and transform your twice-daily frustration into a part of your day you actually look forward to").

[21] <https://www.drivehui.com/> ("Hui is a round-trip, station-based car share program where you can book a vehicle by the hour or day, now or in the future. There's no fee to sign up. Book, change, or cancel reservations—all from our Hui app. Now available on the App Store and Google Play").

[22] See e.g. Wiseman, *Strict Liability of the Bailor, Lessor and Licensor*, *Marquette Law Review*, Vol. 57, Issue 1 (1973); Connecticut (*Rodia v. Tesco Corp.*, 11 Conn.App. 391, 395 (Appellate Court Connecticut 1987) ("A lessor is a 'product seller' within the meaning of General Statutes § 52-572m(a)")).

[23] See e.g. New York (Sukljian, 69 N.Y.2d at 95 ("But not every seller is subject to strict liability. The policy considerations that have been advanced to justify the imposition of strict liability on manufacturers and sellers in the normal course of business obviously lack applicability in the case of a party who is not engaged in the sale of the product in issue as a regular part of its business. The casual or occasional seller of a product does not undertake the special responsibility for public safety assumed by those in the business of regularly supplying those products, nor is there the corollary element of forced reliance on that undertaking by purchasers of such goods")).